Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(C)(A)-1018–06 OF 2015
ROHANA YUSUF, HAMID SULTAN AND PRASAD ABRAHAM JJCA
17 FEBRUARY 2016

Arbitration — Award — Setting aside — Arbitral tribunal awarded damages to appellant taking into account 'inflation' — Inflation never an issue raised in proceedings nor one parties were called upon to address — Whether arbitral tribunal acted beyond jurisdiction and breached rules of natural justice — Whether High Court rightly set aside part of arbitral award that breached s 37(1)(a)(v) of the Arbitration Act 2005 ('Act') and raised valid questions of law under s 42 of the Act

The appellant had engaged the respondent to carry out a warehouse extension project. After the respondent had completed 70% of the work, the appellant terminated the contract and appointed third-party contractors to complete the remaining 30%. When the parties arbitrated their dispute over the termination, the appellant counterclaimed for RM357,419.80 it had allegedly incurred in completing the balance of works left unfinished by the respondent. The arbitral tribunal ('the tribunal') found the appellant had acted reasonably and fairly in terminating the contract and had the right to appoint third-party contractors to complete the remaining 30% of the project. However, since there was lack of evidence to prove the amount that was paid to the third-party contractors, and since it was undisputed that the balance 30% of the contract price was RM260,470.20, the tribunal decided it was fair to award the appellant the said contract price plus 20% of that figure for 'inflation' making the total RM312,564.24. The respondent applied to the High Court pursuant to ss 37 and 42 of the Arbitration Act 2005 ('the Act') to challenge the tribunal's award contending that the issue of 'inflation' decided upon by the tribunal was never pleaded or claimed or raised by the parties at any time nor was it one the tribunal had called upon the parties to address. Accordingly, the respondent contended, the tribunal had acted beyond its jurisdiction and breached the rules of natural justice. The respondent contended that the award contravened ss 37(1)(a)(iv) and 37(1)(b) of the Act and raised valid questions of law under s 42 of that Act. The High Court set aside the tribunal's decision on the counterclaim holding that as there was no proof to support the counterclaim, the tribunal should have dismissed it and not proceeded on its own accord to determine what was a 'fair amount' to be awarded. The High Court held that as the respondent sought to set aside only that part of the award relating to the counterclaim, it had wrongly invoked s 37(1)(a)(iv), instead of s 37(1)(a)(v) of the Act. As to the challenge under s 42 of the Act, the High Court held that

only two out of the four questions of law raised were real, proper and valid. As the tribunal failed to explain where it sourced the factor of 'inflation' or the value of that factor and also failed to invite the parties to address the tribunal on that issue, it had exceeded the limits of its jurisdiction and breached the rules of fair play and natural justice resulting in an unlawful and unconscionable decision that required the court's intervention. The appellant's instant appeal was against the quantum of its counterclaim. There was no appeal by the respondent.

Held, dismissing the appeal with costs of RM10,000 to the respondent:

(1) **(per Prasad Abraham JCA)** The High Court's intervention to vary the award of the arbitral tribunal pursuant to s 42 of the Arbitration Act 2005 was correctly done in this case and the pre-requisites for the exercise of power under s 42 had been complied with. The conduct of the arbitral tribunal in equating the cost of reasonable work done to the inflation rate of 20% amounted to a substantial injustice and the whole process was irregular raising valid questions of law under s 42 of the Act. The 20% 'inflation' factor was not brought up by the parties; they were not alerted to it nor were they invited to address that point. The arbitral tribunal's award therefore contained decisions on matters beyond the scope of the submission to arbitration in breach of ss 37(1)(a)(v) and 37(1)(b) of the Act (see paras 2–3, 10, 12 & 15).

(2) **(per Hamid Sultan JCA, supporting)** It was wrong of the arbitral tribunal to have awarded damages when damages were not proven (see para 48(ii)).

[Bahasa Malaysia summary

Perayu telah mengikat kontrak dengan responden untuk menjalankan projek binaan tambahan gudang. Selepas responden telah menyiapkan 70% daripada kerja, perayu menamatkan kontrak tersebut dan melantik kontraktor-kontraktor pihak ketiga untuk menyiapkan baki sebanyak 30%. Apabila pihak-pihak menimbang tara pertikaian mereka ke atas penamatan tersebut, perayu menuntut balas bagi RM357,419.80 yang ia dakwa menanggung dalam menyiapkan baki kerja-kerja yang tidak disiapkan oleh responden. Tribunal timbang tara ('tribunal') mendapati perayu telah bertindak secara munasabah dan adil dalam menamatkan baki projek sebanyak 30% tersebut. Walau bagaimanapun, memandangkan tidak terdapat keterangan untuk membuktikan jumlah yang dibayar kepada kontraktor-kontraktor pihak ketiga, dan memandangkan ia tidak mempertikaikan bahawa baki 30% harga kontrak adalah RM260,470.20, tribunal memutuskan ia adalah adil untuk mengaward perayu harga kontrak tersebut tambah 20% daripada jumlah tersebut bagi 'inflation' membuat jumlah keseluruhan RM312,564.24. Responden memohon kepada Mahkamah Tinggi berikutan ss 37 dan 42 Akta Timbang Tara 2005 ('Akta')

untuk mencabar award tribunal dengan berhujah bahawa isu 'inflation' yang diputuskan oleh tribunal tidak pernah diplid atau dituntut atau dibangkitkan oleh pihak-pihak pada bila-bila masa juga bukan satu yang digesa oleh tribunal terhadap pihak-pihak untuk menanganinya. Oleh itu, responden berhujah, tribunal telah bertindak melampaui bidang kuasanya dan melanggar peraturan keadilan semula jadi. Responden berhujah bahawa award tersebut bertentangan ss 37(1)(a)(iv) dan 37(1)(b) Akta dan membangkitkan persoalan undang-undang sah di bawah s 42 Akta. Mahkamah Tinggi mengenepikan keputusan tribunal atas tuntutan balas tersebut memutuskan bahawa memandangkan tidak ada bukti untuk menyokong tuntutan balas, tribunal patut menolaknya dan tidak meneruskan atas kehendaknya sendiri untuk menentukan apa yang 'fair amount' untuk diawardkan. Mahkamah Tinggi memutuskan bahawa responden memohon untuk mengetepikan hanya bahagian award berkaitan tuntutan balas tersebut, ia telah secara salah membangkitkan s 37(1)(a)(iv), sepatutnya s 37(1)(a)(v) Akta. Mengenai cabaran di bawah s 42 Akta, Mahkamah Tinggi memutuskan bahawa hanya dua daripada empat soalan undang-undang yang dibangkitkan adalah benar, betul dan sah. Memandangkan tribunal gagal untuk menjelaskan di mana ia mendapatkan faktor 'inflation' atau nilai faktor tersebut dan juga gagal untuk menjemput pihak-pihak untuk membangkitkan isu tersebut kepada tribunal, ia telah melebihi had bidang kuasanya dan melanggar peraturan permainan adil dan keadilan semulajadi mengakibatkan keputusan salah dari segi undang-undang dan tidak munasabah yang memerlukan campur tangan mahkamah. Rayuan perayu ini adalah terhadap kuantum tuntutan balasnya. Tidak terdapat rayuan oleh responden.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 kepada responden:

(1) **(oleh Prasad Abraham JCA)** Campur tangan Mahkamah Tinggi untuk mempelbagaikan award tribunal timbang tara berikutan s 42 Akta dibuat dengan betul dalam kes ini dan kewajipan untuk menjalankan kuasa di bawah s 42 telah dipatuhi. Tindakan tribunal timbang tara dalam menyamakan kos kerja yang dilakukan secara munasabah kepada kadar inflasi sebanyak 20% merupakan ketidakadilan substansial dan proses keseluruhannya adalah tidak teratur membangkitkan soalan-soalan undang-undang yang sah di bawah s 42 Akta. 20% faktor 'inflation' tidak dibangkitkan oleh pihak-pihak; mereka tidak diberitahu mengenainya atau pun dijemput untuk menangani poin tersebut. Award timbang tara tribunal oleh itu mengandungi keputusan-keputusan atas perkara-perkara melampaui skop penghujahan kepada timbang tara dalam kemungkiran ss 37(1)(a)(v) dan 37(1)(b) Akta (lihat perenggan 2–3, 10, 12 & 15).

(2) **(oleh Hamid Sultan HMR, menyokong)** Tribunal timbang tara adalah

salah untuk mengawardkan ganti rugi apabila ganti rugi tidak dibuktikan (lihat perengggan 48(ii)).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1912–1990.

Cases referred to

Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd [2015] 11 MLJ 32, HC (refd)

Amaltal Corp Ltd v Maruha (NZ) Corp Ltd [2004] 2 NZLR 614, CA (refd)

Chai Ming v The Overseas Assce Corpn Ltd [1962] 1 MLJ 282 (refd)

Chain Cycle Sdn Bhd v Kerajaan Malaysia [2016] 1 MLJ 681; [2015] AMEJ 1479, CA (refd)

Chrysalis, Re [1983] 1 WLR 1469, QBD (refd)

Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791, CA (refd)

Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng [1996] 1 MLJ 178, CA (refd)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49; [2003] 1 CLJ 103, CA (refd)

Geogas SA v Trammo Gas Ltd [1991] 1 WLR 776, HL (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)

Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)

Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51; [1994] 3 CLJ 338, HC (refd)

OAO Northern Shipping Co v Remolcadores de Marin SLp, The Remmar [2007] 2 Lloyd's Rep 302 (refd)

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627; [2014] 3 CLJ 632, CA (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak) [2005] 2 MLJ 442; [2004] 3 CLJ 496, CA (refd)

Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 0793; [2010] 5 CLJ 83, HC (refd)

Union of India v Rallia Ram [1963] AIR SC 1685, SC (refd)

Universal Petroleum Co Ltd v Handels- und Transportgesellschaft mbH [1987] 1 WLR 1178, CA (refd)

Vee Networks Ltd v Econet Wireless International Ltd [2005] 1 Lloyd's Rep 192, HC (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) ss 23, 24
Arbitration Act 2005 ss 37, 37(1)(a)(iv), (1)(a)(v), (1)(b), (3), (6), 42, 42(8)

Appeal from: Originating Summon No 24C (ARB)-11–03 of 2015 (High Court, Kuala Lumpur)

Aaron Mathews (Munawirah Mohamad and Juliana Johari with him) (Abdul Raman Saad & Assoc) for the appellant.
Colin Victor George (James Edwin Pushparatnam with him) (James Edwin & Co) for the respondent.

Prasad Abraham JCA (delivering judgment of the court):

[1] We heard this appeal on 17 September 2015 and after hearing the respective parties we reserved our decision to a date to be notified to parties by the court. We now append our grounds for our decision today. This grounds of judgment has been seen by my learned sister YA Dato' Rohana who has agreed to the same. My learned brother YA Datuk Dr Hamid Sultan will deliver a separate judgment. We will refer to parties as they were described in the High Court ie appellant the plaintiff and the respondent the defendant.

FACTS GERMANE TO BE THE APPEAL

[2] In dealing with the defendant's counterclaim, the arbitral tribunal in this case found the defendant was not entitled to recover any loss or damages arising from the termination of the contract. The arbitral tribunal found absence of evidence to support its counterclaim. The arbitral tribunal then went on to say that it would proceed to use the factor of inflation set at 20% being a reasonable sum and the arbitral tribunal proceeded to find on the following basis. The balance of 30% of the contract price RM260,470.20 add 20% inflation RM52,094.04 = RM312,564.24.

[3] This issue was not brought up by the parties nor were the parties alerted to it nor invited to address that point and therefore the award in our view contains decisions on matters beyond the scope of the submission to arbitration in breach of ss 37(1)(a)(v) and 37(1)(b) of the Arbitration Act 2005 ('the Act') and raises question of law under s 42 of the said Act.

[4] The learned judge dealt fairly exhaustively and methodically the challenge mounted by the plaintiff in particular relation to ss 37 and 42 of the said Act. Section 34 (art 34(1) of the Model Law) which allows recourse to court against an arbitral award may only be made by an application to set aside

the same. We agree with the learned judge that s 37(1)(a)(v) would constitute the relevant provision to apply in the light of the challenge being mounted by plaintiff. It is our view that s 37 only allows the court to set aside the award save for the limited exception under s 37(3) of the said Act. As the learned judge exercised her powers to vary the arbitral award, the court could only proceed under s 42 of the said Act (see the decision of this court in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617). The learned judge dealt with s 42 of the Act and the approach of the learned judge was to treat applications under both sections as not being mutually exclusive. We refer to the decision of the New Zealand Court of Appeal in *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 where the court held and we quote:

> Held: 1 The processes under cl 5 of the Second Schedule to the Arbitration Act 1996 (appeals on questions of law) and art 34 of the First Schedule (applications to set aside) were not mutually exclusive. There was no reason why an appeal under cl 5 could not put in issue errors of process by the arbitrator as well as errors of substantive law (both grounds for setting aside under art 34). However, questions of abuse of process or issue estoppel might arise if a party seeks successively to argue the same error of law under both art 34 and cl 5.

We are therefore in agreement with the views of the learned judge expressed on this point.

[5] Turning to s 42 which we set out:

> Reference on Questions of Law
>
> (1) Any party may refer to the High Court *any question of law arising out of an award.*
>
> (1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.
>
> (2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.
>
> (3) The High Court may order the arbitral tribunal to state the reasons for its award where the award –
>
> (a) does not contain the arbitral tribunal's reasons; or
>
> (b) does not set out the arbitral tribunal's reasons in sufficient detail.
>
> (4) The High Court may, on the determination of a reference –
>
> (a) confirm the award;
>
> (b) vary the award;
>
> (c) remit the award in whole or in part, together with the High Court's

determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) On a reference under subsection (1) the High Court may –

(a) order the applicant to provide security for costs; or

(b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

[6] We agree with the approach of the learned judge that the court must intervene where the award is manifestly unlawful and unconscionable. Section 42 has no equivalent in the model law or in parallel jurisdictions. Section 42 is not a provision as to appeals but a reference on a question of law. There has been a line of authorities with regards to the limiting of juridical intervention in arbitration awards and we set out the following decisions on the point ie intervention should only be exercised in clear and exceptional circumstances (see *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681; [2015] AMEJ 1479. We are of the opinion that with the pre requirements of s 42, it followed there would be no danger of 'opening the flood gates' in respect of review of arbitral awards.

[7] In our present case we agree with the finding of the learned judge that the point of inflation being a gauge for work done in the counterclaim and summarily fixing the rate at 20% was not a point raised during the proceedings depriving the plaintiff of an opportunity to address the arbitral tribunal on that point which formed the basis of the award on the counterclaim, the learned judge in our view was correct to find a complaint under s 42 had been made out.

[8] This issue was never 'in play' and therefore intervention of the court was justifiable. In this present appeal, the question for the court to ask was would the conduct of the arbitral tribunal amount to injustice allowing juridical intervention. We refer to the case of *Vee Networks Ltd v Econet Wireless*

International Ltd [2005] 1 Lloyd's Rep 192 a decision of the High Court in the UK and to the grounds of judgment of Colman J and we quote:

> 86. Consequently, in order to conclude that there has been a serious irregularity, the court has to consider that the factual basis of the tribunal's conduct has to have caused or must in future cause substantial injustice to the applicant.
>
> 87. It is clear from paragraphs 23 to 28 of the award that in construing the memorandum the arbitrator did not regard it as necessary to take into account whether, as he found, the services to be provided under the TSA fell within (o) in the Second Schedule. He concerned himself only with whether the obligations of EWI under the TSA were within the objects (n), (b) and (s). He did not deal explicitly with the argument by EWN that, even if they were, what mattered under the 1981 Act was whether, as well as being within what were the unrestricted business objects, the services also fell within (o) which was a restricted activity. This appears to have been because he was proceeding to construe the objects on the assumption that they had to be construed on the basis that the Ninth Schedule as amended in 2003 made it unnecessary to take into account object (o) as part of the statutory background.
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> 88. Had the arbitrator not deviated into the 2003 amendments and had he considered EWN's submissions on the 1981 statutory background, he might but would not necessarily have reached a conclusion favourable to EWN, for it cannot be said that EWN's arguments are hopeless. Further, if before issuing his award he had drawn that point to the attention of the parties, he would have been told that this line of reasoning had never been advanced and was not relied on.
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> ...
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> *Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.*
>
> 91. In my judgment, the argument of EWN on construction of the memorandum of EWI was not so weak that it had no realistic prospect of success. It was a submission which, but for his mistaken understanding of EWI's submissions, he must necessarily have expressly determined. *In these circumstances I conclude that there has in the present case been substantial injustice and therefore a serious irregularity and that consequently this application succeeds.*
>
> (Emphasis added.)

[9] We refer also to the case of *OAO Northern Shipping Co v Remolcadores de Marin SLp, The Remmar* [2007] 2 Lloyd's Rep 302 and to the judgment of Gloster J, DBE which we quote:

> 16 The primary ground relied upon by Buyers in the present case is: '(a) failure by the tribunal to comply with section 33 (general duty of tribunal)'. Section 33 provides as follows:

(1) The tribunal shall –

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

17 Alternatively, Mr Henton submitted that the application can be dealt with underground (c), as set out in section 68(2) , of 'failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties'.

18 Mr Henton recognised that the section 68 threshold is a high one, the aim being to eliminate technical and unmeritorious challenges and promote finality of dispute resolution. Section 68 must not be used for disguised challenges to the correctness of a decision on the facts or law, especially where (as here) the right of appeal under section 69 has been excluded by agreement. In the words of the DAC's Report on the Arbitration Bill (referred to in Lesotho at paragraph 27):

> [s 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.

19 Having said that, the DAC, and their lordships in Lesotho, also recognised that a party's right to a fair and impartial hearing is a fundamental one. An inability on the part of the court to intervene could seriously undermine the international reputation of English arbitration.

20 Where the challenge is made under section 68(2)(a) , the seriousness of the irregularity must be judged in accordance with the fundamental principles laid down in a series of cases which ante-date the 1996 Act, but which have been repeatedly upheld as reflecting the principles enshrined in section 68(2)(a):

21 Thus, Ackner LJ in *The Vimeira* [1984] 2 Lloyd's Rep 66, 76) stated:

> The essential function of an arbitrator ... is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it ...
>
> the adequacy of the turning area was not at the conclusion of the evidence – even

though it was a possible issue at the commencement of the arbitration – any longer a live issue. The arbitrators clearly thought otherwise. They should have so informed the parties ...

and (per Bingham LJ) in *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at p 15:

If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance ...

22 *These principles apply to unargued points of law or construction as they do to unargued questions of fact. In such cases, whilst it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties 'a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion'* (*ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 70).

[10] We are therefore in agreement with the learned judge that the arbitral tribunal had by the manner it had proceeded, caused substantial injustice and the whole process was irregular.

[11] As Her Ladyship in her judgment chose to refer to the provisions of s 37 of the Act, the only order that Her Ladyship could have made was the setting aside of the award. However Her Ladyship then referred to s 42 of the Act which conferred power on the court to vary the award. So it becomes incumbent for us to appraise and decide the sieve mechanism of the said section ie s 42 which had been considered by the learned judge.

[12] The first condition for an exercise of power under s 42 was the questions referred to must be questions of law. In our present case, the conduct of the arbitral tribunal in equating the cost of reasonable work done to the inflation rate of 20% amounted to a substantial injustice and we agreed with the learned judge that was a question of law under s 42 and the High Court rightly dealt with questions (iii) and (iv) accordingly. We refer to *Geogas SA v Trammo Gas Ltd* [1991] 1 WLR 776 quoting Russel on *Arbitration 1997* at para 8.057 and we quote:

> The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

[13] It appears to us that the entire issue being referred to as a point of law to the High Court was simply an issue of law ie whether an arbitral tribunal can impose a percentage based on inflation rate to represent the cost of work done without a plea on that point and no invitation for submissions on the same being called for from parties through their counsel. No further findings of facts were required from the arbitral tribunal. Therefore we are in agreement with learned judge that this issue falls squarely as a question of law set out under s 42 of the Act.

[14] *Arising out of the award*

In our present appeal, the impact of 20% being inflation rate as costs of reasonable work done, arose out of the award of the arbitral tribunal and not out of the arbitration. We refer to *Universal Petroleum Co Ltd v Handels- und Transportgesellschaft mbH* [1987] 1 WLR 1178 where it was held:

> ... that section 1 of the Arbitration Act 1979 introduced a new system of filtered appeals from reasoned awards of arbitrations; that section 1(1) abolished appeals and remissions for errors on the face of the awards, and under section 1(2) appeals were only permitted on any question of law arising out of an award and not out of the arbitration; that, under that subsection, the court was given the power to order further reasons limited to cases where the award did not, or did not sufficiently, set out the reasons and where it was necessary to have reasons in sufficient detail to enable the court to consider any question of law arising out of the award; and that since no material uncertainty or ambiguity arose out of the award, an order by the court, particularly one which amounted to a cross-examination of the arbitrator, was wrong ...

[15] *Findings*

(a) the intervention to vary the award of the arbitral tribunal by the High Court pursuant to s 42 of the Act was correctly done in this case;

(b) s 37 of the Act would only apply where the consequence of an application would be the setting aside of the award;

(c) the prerequisites for s 42 of the Act had been complied with; and

(d) we agree that the arbitral award in this case should be reviewed pursuant to s 42 and varied accordingly.

[16] In passing we note that Parliament has plainly intended a strict limitation on the role of the courts when the choice of arbitration for dispute resolution has been made. However s 42 of the Act whilst continuing to remain on the statute book, vested the court with power to intervene. As explained earlier in this judgment the pre requisite to the court exercising its power under s 42 must be complied with before the court could act. We are of the view that Parliament in adopting s 42 and incorporating these pre requisites clearly intended that the courts' power to intervene under s 42 is restricted. The court should therefore be always slow rather than interventionist in dealing with arbitral awards.

[17] On the upshot, we would dismiss this appeal with costs of RM10,000 to the respondent.

Hamid Sultan JCA (delivering supporting judgment of the court):

[18] The appellant ('Petronas') appeals against the decision of the learned High Court judge in respect of an application by the respondent to set aside or vary the award under ss 37 and/or 42 of the Arbitration Act 2005 ('the AA 2005').

[19] The matter came up before us on 17 September 2015 and upon hearing submission, we reserved judgment. My learned brother Prasad Sandosham Abraham JCA had agreed to write the judgment of the court and I agreed to write on the jurisprudence relating to s 37 as well as s 42 of the AA 2005.

[20] After having read the appeal record and submission of the parties, I take the view that the applications before the learned High Court judge was misconceived and ought to have been dismissed in *limine*. As the respondent has not appealed and the appellant is only contesting the quantum in respect of its counterclaim, it will not be appropriate in law to dismiss the appeal on the grounds that the applications before the learned trial judge were misconceived. The reason being both the appellant and/or respondent is not complaining before this court that the applications were misconceived.

[21] Notwithstanding there is no complaint that the applications were misconceived, the appellate court should not be seen to be condoning misconceived applications. To arrest such misconceived application, I have taken the liberty after having heard the submissions as well as further

submissions to set out the jurisprudence relating to ss 37 and 42 of the AA 2005.

[22] In this case, it must be noted that the arbitrators were retired judges of Court of Appeal and Federal Court as well as one who had served as CJ Malaya. In a complaint relating to s 37, the complainant needs to demonstrate that the arbitral process was compromised and has nothing to do with the grounds in the arbitral award. The threshold to succeed in a s 42 application is extremely high. In addition, courts have repeatedly said that it will not interfere on the error of fact and/or law when it falls within the jurisdiction of the arbitral tribunal unless such error results in 'patent injustice'. Support for the proposition is found in a number of cases, to name a few are as follows: (a) *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791; (b) *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627; [2014] 3 CLJ 632; (c) *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83.

[23] In *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627; [2014] 3 CLJ 632, sitting with Hishamudin Mohd Yunus JCA and Aziah bt Ali JCA, I have asserted:

> ... the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside.

[24] In *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83, it was stated:

> [13] I have no hesitation in saying that in the instant case the provision of the AA 2005 is applicable notwithstanding the Arbitration agreement was made before the AA 2005 came into force ie the date being 15 March 2006. Even assuming that AA 1952 applies, the facts stated by the plaintiff do not permit the intervention of court as Justice KN Segara sitting in the Court of Appeal in the case of *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791, CA have in an articulate manner, in practical terms, put a stop to the interference of court by stating that:
>
> > The final award of an arbitrator must be viewed in its totality and any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby, justify the award being set aside. On the facts of this instant appeal, there was no error of law on the face of the final award for the High Court to review. When an arbitrator does not accept any submission made by counsel with regard to any proposition of law, such act or conduct does not render the award infected with an error on its face. Clearly, there was no legal proposition by the arbitrator, forming the basis of the award, which was erroneous.

[14] The other appellate judges have readily concurred making the decision a formidable authority in this area of law in contrast to earlier apex decisions.

And at page 98:

[20] I will say that draftsmen of provisions such as ss 8, 9, 37 and 42 have with great ingenuity asserted that court should not interfere with arbitrator's award without out rightly saying so. If they have said so out rightly, it will stand to be unconstitutional. Thus, it will appear that it is going to be difficult to frame any question of law pursuant to AA 2005 when the subject matter of complaint is one which is restricted by ss 9, 37, or 42 etc. It is now for the courts themselves to restrain from interference unless it is a case of patent injustice which the law permit the court in clear terms to intervene. It is trite that AA 2005 is meant to promote one-stop adjudication. In *Lesotho Highland Development Authority v Impregilo Spa* [2005] UKHL 43, Lord Steyn sitting in the House of Lords had this to say:

> I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed; it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point.

BRIEF FACTS

[25] The facts of the case as well as what was held by the learned trial judge has been meticulously set out by the editors of MLJ in *Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd* [2015] 11 MLJ 32. Much judicial time will be saved by reproducing the same.

[26] The summarised facts read as follows:

> Ahmani Sdn Bhd ('Ahmani') was appointed by Petronas Penapisan (Melaka) Sdn Bhd ('Petronas') in a project to extend its warehouse. Petronas issued a termination notice which was challenged by Ahmani and the dispute was referred to arbitration. Petronas counterclaimed for additional costs of RM357,419.80 incurred in completing the balance of the works left uncompleted by Ahmani. The arbitral tribunal ('the tribunal') found that Petronas had acted reasonably and fairly in terminating the contract due to Ahmani's breach. The tribunal found that Petronas had the right to appoint third party contractors to do the remaining 30% of the project. However, in relation to the proof of the sum paid to the third party contractors, there was lack of evidence. In the absence of evidence from the third party contractors to support their documents, the tribunal went on to consider what was a fair amount incurred by the respondent to support its counterclaim. In considering what was a 'fair amount', the tribunal said that it was not disputed the

balance 30% of the contract price was RM260,470.20. It went on to say that it was common knowledge that unfinished job would cost more to be completed by another contractor. The tribunal used the factor of 'inflation' in the absence of oral evidence to support the documents for the benefit of the claimant. After considering that an inflation of 20% as reasonable, the arbitral tribunal calculated the additional costs and awarded Petronas the sum of RM312,564.24 as additional costs incurred to complete the remaining 30% of the works. It was this specific issue of inflation when calculating Petronas' additional costs that Ahmani contended that the tribunal had gone wrong quite aside from its other contention that the tribunal had awarded on an un-pleaded and unclaimed matter. The tribunal was said to have gone wrong by dealing with a matter or issue which Ahmani claimed was not brought up by the parties, that the parties were not alerted to and invited to address, that the Award contained decisions on matters beyond the scope of the submission to arbitration which contravened s 37(l)(a)(v) and 37(l)(b) of the Arbitration Act 2005 ('the Act') and raised questions of law under s 42 of the Act. Under s 42, Ahmani offered four questions of law which it claimed emanated or arose out of the award; namely: (a) whether the tribunal could award a sum which was not pleaded?; (b) whether the tribunal could award a sum which was not claimed?; (c) whether the tribunal could make its findings based on issue which was never presented or argued before it?; and (d) whether by not inviting parties to present or argue on the issue which formed the basis of its decision, the tribunal had acted beyond its jurisdiction and breached the rules of natural justice?

[27] The court allowing the application held:

(1) Section 37(l)(a)(iv) was not properly invoked as Ahmani was seeking to set aside only a part of the award that which was in respect of the counterclaim; and not the whole award as there was that other part of the award which was in its favour. That being the case, only s 37(l)(a)(v) could be relied on as read together with sub-s (3), it allows for those parts of the award which contain decisions on matters which had not been submitted to arbitration to be set aside.

(2) Section 37(l)(b)(ii) could not be invoked because again, this ground leads to the setting aside of the whole award and not just the part complained of.

(3) In this case, the complaint was that there was a breach of natural justice during the arbitral proceedings or in connection with the making of the award when the tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation is true, then it would be the whole award which will be tainted and not just that part identified by the complainant. The provisions of s 37 does not appear to allow the court to sever as it may in cases of allegations of violations of s 37(l)(a)(iv).

(4) That left: then a challenge under s 37(l)(a)(v). Here, proof must be offered to show that the award contained decisions on matters beyond the scope of the submission to arbitration. The tribunal should not base its decision on matters that the parties have not submitted on. Where the tribunal has done so, as was alleged here, then a case of a breach of natural justice is

made out; *Government of India v Cairns Energy & Anor* [2013] MLJ 123 referred.

(5) The parties did not address the tribunal on the factor of inflation and what would be a fair amount to 'support' Petronas' counterclaim. With a lack of proof, the tribunal ought to have dismissed Petronas' counterclaim. As the counterclaim was essentially a loss and expense claim, there must at the very least be some evidence before the tribunal could come to the decision on the counterclaim. Where there was absent evidence to prove a claim, the claim or counterclaim ought to have been dismissed. Instead, the tribunal proceeded to assess a 'fair amount incurred by the respondent'. It did this by computing and thereby indirectly proving Petronas' counterclaim for Petronas. This is where the tribunal had exceeded its jurisdiction. It was this failure that gave merit to Ahmani's complaint that the award contained a decision on a matter beyond the scope of the submission to arbitration under s 37(l)(a)(v). This rendered the award manifestly unlawful and unconscionable. Accordingly, that part of the award must be set aside.

(6) On the challenge under s 42, questions (a) and (b) did not come within the test of being real, proper and valid questions of law. However, questions (c) and (d) were real and not dressed up questions relating to an appeal against the tribunal's findings.

(7) Under s 42, the intervention should only be exercised in clear and exceptional circumstances. The questions of law must only be questions of law and not questions of fact or even questions of mixed fact and law. These questions of law must be identified with sufficient precision or is intelligibly framed citing the grounds or basis relied on. The identified questions of law must also be legitimate, real, proper and valid; and they must arise out of the award and not from or during the proceedings. The tribunal remains the sole determinant of the facts and the evidence. The court however, must intervene where the award is manifestly unlawful and unconscionable.

(8) The tribunal did not explain where it sourced the factor of inflation; or the value of that factor of inflation in the matter of the computation of additional costs of completing the remaining works. The tribunal's decision on this matter was clearly one that it could not and should not have embarked on without first hearing out the parties. Doing so not only exceeded the limits of the dispute that was submitted to the tribunal for decision, it also breached the rules of fair play and natural justice. The decision of the tribunal on this matter was within what has been described in *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* as a decision that requires intervention of the court.

(9) The tribunal's decision on the counterclaim must be set aside. It was, not for the court to substitute its views to the extent of exercising discretion on the award of nominal damages. It was only appropriate and just that that part of the award be set aside.

A JURISPRUDENCE RELATING TO SS 37 AND 42 OF THE AA 2005 LIMITED TO THE FACTS OF THE CASE

[28] In challenging an award related to domestic arbitration it has now become a common practice to file the application under ss 37 as well as 42. There are case laws to support such an approach. However, for proper management of issues under ss 37 and 42, the application must be separately dealt with as the jurisprudence involved in dealing with the applications varies. I will explain this further in the judgment.

[29] An application to set aside an award under s 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy. An application under s 42 has nothing to do with the award making process but has everything to do with the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between ss 37 and 42 is that like of an apple and an orange. Sections 37 and 42 read as follows:

37(1) An award may be set aside by the High Court only if –

(a) the party making the application provides proof that –

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia;

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)*(b)*(ii), an award is in *conflict* with the public policy of Malaysia where –

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred –

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

42(1) Any party may refer to the High Court any question of law arising out of an award.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award –

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference –

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's

A determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

B

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

C

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) On a reference under subsection (1) the High Court may –

D

(a) order the applicant to provide security for costs; or

(b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

E

[30] For example, in this case the complaint by one of the parties was that the learned arbitrators when dealing with damages proceeded on the frolic of their own without inviting submission and awarded damages. Such a breach will not fall under s 42 of the AA 2005 but will fall under s 37(1)(a)(iv) and/or (v), etc, as the complaint is that the affected party was unable to present the case and it may follow that the award contains decisions on matters beyond the scope of submission to the arbitration or breach of natural justice, etc.

F

[31] The threshold to satisfy under s 37 is very low (though the courts are slow in setting aside the award) and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in s 37(6). This was not done in this case. To put it in another way when a party to the arbitration complains of breach related to s 37(1)(a)(iv) and/or (v) etc, he must invite the courts attention to s 37(6) and cannot rely on s 42 as it will be an abuse of process, as he is relying on omission or excess of jurisdiction which is covered under s 37 and not s 42 of the AA 2005.

G

H

[32] In addition, once the applicant had chosen to rely on s 37 grounds as stated earlier that will mitigate a no-case under s 42. I do not think it will be a proper exercise of judicial power to entertain an application under s 42 when the applicant is relying on the same facts as advocated for a s 37 application. In my considered view, a trial court ought not to entertain an application under s 42 at all. I will explain this further.

I

[33] The threshold to satisfy s 42 requirements is very high and I will say in consequence of case laws, it is extremely high. That is to say, if a party cannot succeed under s 37, on the same facts and complaint the general jurisprudence will dictate an application under s 42 will be futile as s 37 relates to arbitral process and s 42 relates to arbitral award.

[34] Before the trial court hears an application under s 42, it must take cognisance of some well established principles, which the court has considered under ss 23 and 24 of the Arbitration Act 1952 under the old regime as well as the new regime which advocates court should not readily intervene in arbitration award unless there is a patent injustice.

(a) Learned author of *Halsbury's Law of England* (Fourth Ed) Vol 2 p 334 in the caption 'Error of law on face of award' states as follows:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is now lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that that can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
>
> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

(b) In *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178 the Court of Appeal has asserted that there is a duty for the court to preserve the award unless there was an error of law on the face of it. Abu Mansor JCA (as he then was) opined:

> Likewise, we unanimously hold that the dispute was properly before the arbitrator by consent, and that there is absence of any error of law by the arbitrator on the face of it. It is trite law that it is the duty of the learned Judge to preserve the award unless there was an error of law on the face of it. We fail to find any. It was an award given by an arbitrator agreed to by both parties to a compromise agreement. Both agreed that, that particular

cl 4.2 dispute, if any, would be resolved by a named arbitrator whose decision shall be final. Clearly, there was a dispute and one party brought the dispute before the named arbitrator. No court would or should allow the other party to renege on it. The other party must be bound by the decision of the arbitrator as he had agreed to be so bound.

(c) In *Chai Ming v The Overseas Assce Corpn Ltd* [1962] 1 MLJ 282, Suffian J (as he then was) stated:

> As regards (a), (b) and (c), the law is that in determining whether an award should be remitted or set aside on the ground that there is an error of law appearing on the face of it, the Court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take the award at its face value, *James Clark (Brush Materials) Ltd v Carters (Merchants) Ltd* .

(d) Allegations of errors of law and/or facts have to be proved before s 23 can be invoked. In *Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak)* [2005] 2 MLJ 442; [2004] 3 CLJ 496, Mohd Ghazali Yusoff JCA observed:

> Before us, the appellant's counsel contended that since both parties had urged the court to remit the award to the reconsideration of the arbitrator, the learned judge should have accordingly made an order to 'that effect. The learned judge erred in law when he applied the principle adopted in *Ong Guan Teck & Ors v Hijjas* , that the power of the Court is a discretionary one. Counsel pointed out in Ong Guan Teck the application was contested whereas in the instant case both parties consented that the matter be remitted to the reconsideration of the arbitrator.
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> Section 23 of the Act confers a wide discretion for the court to remit an award. We however do not think that just because parties have formed the view that the award is bad on the face of it, the court need not go further and should grant an order in terms of any motion to remit the award to the reconsideration of the arbitrator. That seems to be the stand of the appellant in the court below and the appeal before us. In order to determine whether an award is bad on the face of it, which would warrant the award to be remitted to the reconsideration of the arbitrator, a judge will have to scrutinise the grounds of award and all accompanying affidavits and its contents presented with the motion before he can determine whether he should exercise his discretion pursuant to s 23 of the Act.

(e) In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, His Royal Highness Raja Azlan Shah (as HRH then was) opined:

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these

two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

(f) In *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51; [1994] 3 CLJ 338, Dr Zakaria bin Mohd Yatim J (as he then was) stated:

> In the present case the parties had agreed in the arbitration clause in the contract that the construction, validity and performance be governed by Malaysian law. Under s 11 of the Civil Law Act, the Court has the discretionary power to award interest for the recovery of any debt or damages. In the Court's view the arbitrator had the same power as that of the court to award interest at such rate as he thought fit. Since it was within the discretion of the arbitrator to award interest in this case, the Court would not interfere with the exercise of his discretion.

(g) In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788, Gopal Sri Ram JCA opined:

> ... So jealously did the common law guard against curial inference with private arbitrations that it was most reluctant to create exceptions to the general rule.

(h) The learned judge of Court of Appeal cited the case of *Union of India v Rallia Ram* [1963] AIR SC 1685 which reads as follows:

> The award in the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it is reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

(i) Richard Malanjum JCA (as he then was) when delivering the judgment of the Court of Appeal in the case of *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49; [2003] 1 CLJ 103 cited *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 where it was stated as follows:

> ... the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pte Ltd v Union of India* [1989] AIR SC 777 at p 780:
>
> > When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on the merits.

(j) In *Universal Petroleum Co Ltd v Handels- und Transportgesellschaft mbH* [1987] 1 WLR 1178 the court held:

(1) Since appeals to the High Court against arbitration awards were restricted, by s 1(2) of the 1979 Act, to appeals on questions of law 'arising out of an award', it followed that any question of law forming the basis of an appeal had to arise out of the award itself and not merely out of the arbitration, and furthermore, as under the former jurisdiction, primary findings in an award could only be challenged if there was misconduct by the arbitrator or if there was lack of jurisdiction or if at the request of the parties he had left to the court the question whether there was evidence to support a particular finding. The abolition, by s 1(1) of the 1979 Act, of the former jurisdiction to set aside or remit an award had not changed the fundamental feature of the resolution of disputes by arbitration that the arbitrator's primary findings were final and intended to be immune from review by the courts. In particular, the abolition of the jurisdiction to set aside or remit an award for error on the face of the award had not widened the ambit of appeals to permit an appeal on a question of law which did not arise on the face of the award (see p 744 g to j, p 745 h to p 746 c and p 748 a, post).

(2) Moreover, since the jurisdiction under s 1(5)(b) of the 1979 Act to remit an award to the arbitrator for further reasons to facilitate an appeal was subsidiary to the court's power to give leave to appeal on a question of law, it followed that it was subject to the same restrictions and therefore the power to remit for further reasons could only be exercised if the award itself required that course, and accordingly material extrinsic to the award was irrelevant and inadmissible in deciding whether to remit for further reasons (see p 746 c to e and p 748 f, post); *Athens Cape Naviera SA v Deutsche Dampfschiffarts-gesellschaft 'Hansa' AG*, *The Barenbels* [1985] 1 Lloyd's Rep 528 applied.

[35] It must be noted that the above principles are largely related to the old regime. The old regime does not advocate party autonomy concept and/or confidentiality doctrine, at the expense of court intervention. The previous ss 23 and 24 or its equivalent in England and the case laws arising from therein has been the cornerstone for Malaysian courts for deciding an application under s 42. Even under the previous regime, the test to remit the award and/or set aside was very strict, notwithstanding the previous regime was largely based on the concept of 'court knows best' as opposed to the new regime under the model law which advocates 'the arbitrator knows best' and the court is obliged to respect party autonomy concept as well as the confidentiality concept. In relation to the confidentiality concept, courts are obliged to take cognisance of the fact that disclosures of the facts of the case to impinge the award will impinge the confidentiality concept as well as the party autonomy concept to reach finality. In consequence, the courts are obliged to show deference to the

spirit and intent of the Model Law 1985 which has been subsumed in the AA 2005 to a large extent.

[36] The ss 23 and 24 under the AA 1952 read as follows:

Section 23 Power to remit award

1 In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

2 Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

Section 24 Removal of arbitrator and setting aside of award

1. Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

2. Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

3. Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

[37] The powers to remit or set aside is found in ss 23 and 24 of the AA 1952 though there is no power to vary the award in those two sections. The power to do so is not restricted by any grounds as set out in s 37 or 42 of the AA 2005. Section 37 does not give the court the power to vary, even though it can remit or set aside the award. Section 42 gives the court power to remit, vary or set aside. One common thread in the old regime as well as ss 37 and 42 is the requirement to remit the award. In the instant case, no attempt was made to remit the award to the arbitrator.

[38] Having said the above, in dealing with s 42, the court must ensure that the court process is not abused and that the party autonomy concept as well as the principle relating to finality of award is respected. To enable the court to ensure that the court process is not abused, the section as well as case laws provides clear guidelines.

[39] The first step is to consider the provision of s 42(8) which relates to security. That was not done in this case. Though I take note on the facts of the case and financial strength of the parties, it was not necessary.

[40] The second step is for the court to ask the hypothetical question, taking the complaint of the applicant at its highest whether the purported question of law raised, will substantially affect the right of the parties. If it will not then the application must be dismissed at *limine*.

[41] The third step will arise if the applicant succeeds in the second step. The third step arises in consequence of case laws under the old regime as well as the new regime. That is to say the applicant must make out a case of 'patent injustice' as a threshold requirement for the court to consider the application on merit under s 42.

[42] If the applicant makes out a case of patent injustice, then the fourth step is to deal with the merit. In dealing with s 42 on merit, the courts must refrain from acting on the guidelines of case laws from other jurisdiction where our section is not *pari materia* and/or the procedural methodology is not the same. For example, a number of Malaysian cases has relied on the English case of *Re Chrysalis* [1983] 1 WLR 1469 where Mustill J had given guidelines as to the proper test to determine a 'question of law' arising from arbitration. What is important to note is that the court was not dealing with an equipollent section as that of s 42. In addition, the Arbitration Act which the English court was dealing with was related to the old regime. The old regime allows wide parameters to intervene and has nothing to do with party autonomy concept. Even though s 42 is not found in the Model Law 1985, nevertheless the policy of the Model Law as well as the AA 2005 is to sustain party autonomy, confidentiality as well as finality of the award concepts which has nothing to do with the old regime. Mustill J approach to show whether the award can be shown to be wrong in law is a three-fold test which necessarily invites to deal with finding of facts. In law it is not permissible under s 42 and/or the spirit and/or intent of the AA 2005 in challenging the award to deal with finding of facts. If at all the facts had to be garnered, it must be found in the award itself and not in any other extraneous documents and/or affidavits. Mustill J explains the three stages as follows:

> Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the 3 identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contracts, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.
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> In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts

found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely tight answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.

Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated D by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated.

Whether stage (3) can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. *Pioneer Shipping Ltd v B T P Tioxide Ltd* [1982] AC 724 and *Kodros Shipping F Corporation v Empresa Cubana de Fletes (No 2)* [1983] 1 AC 736, show that where the issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the Q arbitrator has gone wrong at the second stage. But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award.

[43] In my view, reliance of the old cases relevant to the old regime to deal with s 42 had led to convoluted judgments inconsistent with the spirit and intent of the Model Law as well as the AA 2005.

[44] In my view, a literal interpretation of s 42 of the AA 2005, taking into consideration the policy of Model Law as well as the AA 2005, the question of law must arise out of the award. That is to say, the applicant must demonstrate the question of law looking at the award and not any other extraneous material. The court must take the award at its face value. It is a strict test and the section as well as the policy of the Act only requires the court to take a common sense approach. Convoluted jurisprudence does not help in a party autonomy concept where confidentiality as well as finality of the award plays a crucial role for the court to decide whether or not it should intervene.

[45] Some examples may help to appreciate the strict test. For example:

(a) in a case where limitation has set in as per the grounds in the award in respect of some parts of the claim, but the arbitrator has not taken that into consideration and allowed the full claim of the claimant against the

respondent, then a question of law would have arisen but whether it will substantially affect the rights of one or more parties must be approached in a holistic manner taking into consideration the case laws which says the court should only intervene in a case of 'patent injustice' and not just related to the quantum of the award; and

(b) in a case where the grounds of the award says the claimant has not proved damages, nevertheless the court has assessed damages; on such facts, a question of law will have arisen but whether it substantially affects the right of one or more parties is questionable. A holistic approach must be taken as the substantive law of the country does not prohibit the court in granting damages even though damages has not been proved but where common sense will dictate that the claimant will have suffered damages. There are a number of cases in accident matters where courts have granted loss of earning where it has not been proved. In any event, such a breach may not qualify to attract the jurisprudence relating to 'patent injustice'.

[46] The fifth step will arise if the threshold as to the merit is satisfied, and if so, the first option to the court is to consider whether it is a fit and proper case to remit the award to the arbitrator for reconsideration. This is a safe guard guaranteed in s 42 itself to sustain party autonomy concept where the court takes the view that the arbitrator has fallen into error and/or what often under the previous regime is referred to as a technical misconduct.

[47] The final step must only be to set aside or vary the order.

[48] I have read the appeal record and the submission of the parties in detail. After having given much consideration to the argument of the parties, I take the view that the appeal must be dismissed. My reasons, inter alia, are as follows:

(a) the facts of the case do not attract a reference under s 42 at all. Since both parties have filed an application under ss 37 as well as 42, the court dealt with the merit of the complaint without taking into consideration, the jurisprudence which I have stated earlier; and

(b) on the special facts of the case and when there is no complaint that s 42 is not applicable, I am inclined to agree with the learned trial judge that it was wrong for the arbitral tribunal to award damages when damages was not proven.

[49] In consequence, I will dismiss the appeal and support the decision of the majority who had concluded that the appeal must be dismissed.

I hereby order so.

Appeal dismissed with costs of RM10,000 to the respondent.

Reported by Ashok Kumar